No. 76-1555

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

BASIN, INC., *Petitioner*

vs.

FEDERAL ENERGY ADMINISTRATION, *Respondent*

Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals

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Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals

Petitioner prays that a writ of certiorari issue to review the March 7, 1977, judgment of the Temporary Emergency Court of Appeals (TECA), reversing and rendering the October 22, 1976, judgment of the United States District Court for the Western District of Texas, San Antonio Division.

OPINIONS BELOW

Three opinions were delivered by the courts below. Each is printed in the separately bound appendix to this petition for ease of reference by the Court. Citations follow:

(1) Basin, Inc. v. FEA, 534 F.2d 324 (TECA April 12, 1976).

(2) Basin, Inc. v. FEA, ...F.Supp....., 4 CCH, Energy Management ¶ 26,063 (USDC, W.D. Tex., S.A. Div., October 22, 1976).

(3) Basin Inc. v. FEA, ... F.2d....., 4 CCH, Energy Management ¶ 26,071 (TECA March 7, 1977, reh.den. April 18, 1977).

JURISDICTION

The judgment of TECA was entered on March 7, 1977, and rehearing denied on April 18, 1977.

The jurisdiction of this Court is invoked under § 211(g) of the Economic Stabilization Act of 1970, 12 USC 1904 note, which by express statutory provision applies to judicial review of regulations issued under the Emergency Petroleum Allocation Act of 1973, 15 USC 754.

QUESTION PRESENTED

Whether, given the statutory standard for judicial review, the court properly enjoined application to petitioner of a freeze action of the FEA which, from admittedly adequate evidence, the court determined is "arbitrary, capricious and an abuse of discretion in that it effectively eliminates recent comers from the crude oil marketing industry without any compelling circumstances to do so" and by which, if continued, "in all likelihood [petitioner] will be forced out of business".

A 3 judge TECA panel in April, 1976, said "yes"; the reviewing district court in October, 1976, said "yes"; a different 3 judge TECA panel in March, 1977, said "no".

STATUTES AND REGULATION INVOLVED

Administrative Procedure Act, 5 USC 706(2):

> "**Scope of review** . . . The reviewing court *shall*—(2) hold unlawful and set aside agency action . . . found to be—(A) **arbitrary, capricious,** an **abuse of discretion,** or otherwise not in accordance with law."[1]

Economic Stabilization Act of 1970, 12 USC 1904 note:

> "§. 211. **Judicial review**
>
> "(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder . . . ."
>
> . . .
>
> "(d)(1) Subject to paragraph (2), no regulation of any agency exercising authority under this title shall be enjoined or set aside, in whole or in part, unless a final judgment determines that the issuance of such regulation was in excess of the agency's authority, was **arbitrary** or **capricious**, or was otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code. . . ."
>
> . . .
>
> "(2) A district court of the United States or the Temporary Emergency Court of Appeals may *enjoin* temporarily or permanently the *application of a particular regulation* or order issued

[1]For assistance to the Court we have added emphasis as appropriate in quotations throughout this petition and the appendix.

under this title *to a person who is a party to litigation before it.*"

Emergency Petroleum Allocation Act of 1973, 15 USC 754:

> ". . . . sections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on November 27, 1973) shall apply to the regulation promulgated under section 753(a) of this title, to any order under this chapter, and to any action taken by the President (or his delegate) under this chapter, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; . . ."

FEA Freeze Regulation, 10 CFR 211.63(b)(1):

> "All supplier/purchaser relationships in effect under contracts for sales, purchases and exchanges of domestic crude oil on January 1, 1976, shall remain in effect for the duration of this program; . . . ."[2]

[2]The original freeze date was December 1, 1973. By amendment of February 18, 1976, 41 F.R. 7386, the date was changed to January 1, 1976, but this had no substantive effect because petitioner had been frozen away from supplies by a regulation in effect at all times (or retroactively made so) between those dates.

STATEMENT

Petitioner is a small independent crude oil marketing company (only about 20 employees).[3] It was organized in October 1973. By December 1, 1973, petitioner had crude oil supply commitments of approximately 1,000,000 barrels per month.

On January 14, 1974, without any published notice of intention to do so, FEA issued a "freeze rule" which immediately deprived petitioner of 75% of those supply commitments (App. 10). Further it effectively froze petitioner, and any other would-be newcomer, away from practical access to all sources of supply. It locked out all new competition.

Petitioner ran the *administrative* gantlet seeking relief. FEA privately and publicly recognized the injustice, made a lame effort or two to correct it but did not do so.

[3]Crude oil marketing is a highly specialized industry – not to be confused with mere brokering. FEA's answer admits the accuracy of the following description from par. 14 of the Amended Complaint in the district court:

> "The industry is a lawful one, and provides valuable crude oil marketing services to crude oil producers, including the calibration and gauging of producers' field stock tanks; the providing of tank calculation tables; measurement of recovered crude oil; adjustment of crude oil measurements for temperature, gravity and basic sediment and water content; preparation of run tickets on which payments are made; examination of title to producers' leases; determination of names, addresses and current decimal interests of all working interest, royalty interest and overriding royalty interest under the producer's lease; preparation and circulation of necessary division orders; filing of State Commission production and purchase reports; payment of state severance and other taxes; distribution of net proceeds among the various interest owners; and the providing of a market and transportation (usually by trucking) for crude oil from remote production areas to the ultimate refinery."

Petitioner sought *judicial* review by the procedure which Congress had prescribed (*supra* p. 3). In their Answer to Amended Complaint, ¶ 56, "Defendants admit that plaintiff has exhausted its administrative remedies.[4]

On October 6, 1975, the district court, on the basis of a full day's evidentiary hearing, issued a preliminary injunction. FEA immediately appealed to TECA. Before the appeal was heard FEA changed the posture of the controversy by amending the freeze rule and stated it was considering further amendments. For that reason, TECA remanded the case, explaining:

> "Because of the changed posture of this controversy, we shall vacate the preliminary injunction and remand the cause to the district court for further consideration consistent with this opinion. . . .We believe an *expedited hearing* would be appropriate in order to enable the district court *to determine promptly the relevant facts* . . ." (App. 7).

Further in that opinion TECA gave to the district court these explicit instructions to govern its judicial review:

> **"Certainly, any governmental action that will effectively eliminate relatively recent comers from an industry calls for critical scrutiny and can be justified only by a clear showing of compelling circumstances."** (App. 6).
>
> . . .

[4]Frank Zarb, FEA Administrator, was a party but has since resigned that position so is not named in the caption in this petition.

> "Basin has strongly represented to us that the relationships, pressures and economic interests in the oil industry are such as to make this formal broadening of its access to producers practically meaningless. *We view this issue as involving relevant questions of fact* concerning Basin's present supply and its allegedly futile efforts to enlarge its supply that can *most appropriately be resolved* through an evidentiary hearing *in the district court.*" (App. 4).

The trial proceeded. The judicial review was careful and thorough. It consumed almost two weeks. Both sides presented their proof in elaborate detail. The court analyzed the evidence and made comprehensive findings and conclusions from it (App. 8-19). And it granted this specific relief (App. 20):

> "IT IS ORDERED AND ADJUDGED
> "that 10 C.F.R. §211.63 as it now exists: (a) effectively eliminates recent comers from the domestic crude oil marketing business and there are no compelling circumstances to justify that elimination, and (b) contravenes the Congressional mandate set forth in 15 U.S.C. §753(b)(1), and (c) as to new entrants to the crude oil marketing business, does not constitute an allocation of crude oil but rather is a total denial of access to crude oil to them, and (d) is **arbitrary, capricious,** and an **abuse of discretion,** and (e) is therefore invalid, unlawful, null and void.
>
> "IT IS FURTHER ORDERED and ADJUDGED
> "that the Defendants should be, and they hereby are, permanently enjoined from enforcing or executing 10 C.F.R. §211.63 *against the Plaintiff.*"

FEA again appealed to TECA. This time a different 3 judge panel heard the case.[5] It reversed and rendered judgment for the FEA — in spite of the detailed determinations of the reviewing district court, *none of which TECA held to be unsupported by adequate evidence.*

After critical scrutiny the district court found the governmental freeze to have the precise effect which TECA's directions had said could be "justified only by a clear showing of compelling circumstances":

> "The freeze rule, as last amended by the FEA on June 11, 1976, and as in effect at all times since January 14, 1974, has effectively eliminated relatively recent comers — including Basin — from the crude oil marketing business." (App. 15).

Likewise the district court determined that that situation was continuing and would probably be fatal to petitioner:

> "If the freeze rule as presently constituted remains in effect, in all likelihood, **Basin will be forced out of business,** and the entry of **any newcomer** into the crude oil marketing business **will be effectively foreclosed.**" (App. 16).

The district court specifically considered the pivotal question of "compelling circumstances" which TECA had directed it to scrutinize critically. The determination was direct and to the point:

[5]Judge Johnson, the author of the second TECA opnion, though designated as a member of the panel that heard the first appeal, did not sit for the argument. Only Judges Hastie, the author of the first opinion, and Anderson were present.

> ". . . . it effectively eliminates recent comers from the crude oil marketing industry *without any compelling circumstances to do so* . . . ." (App. 18).

The reversing TECA opinion expressly approved those findings and did not question the evidentiary support on which they rest (App. 33):

> "We do *not* overturn the district court's finding that new entrants to the business are foreclosed.
>
> . . .
>
> "Basin may engage in any *other* lawful activity."[6]

The district court also followed the directions in the first TECA opinion to determine as a *fact* whether the minor adjustments to the freeze meaningfully broadened petitioner's access to supply. It went through each change from inception and found:

> "The relationships, pressures, and economic interests in the oil industry are such as to have made the various amendments to the freeze rule *insignificant* in improving the access of new market-entrants to crude oil supplies. Basin has attempted in good faith to purchase crude oil supplies and to compete as a newcomer in the crude oil marketing business under each of such amendments, and all such attempts have been fu-

[6]W. R. Davis, the principal owner and chief executive officer of Basin, was not equipped to go into some other business. In explanation of his formation of Basin he testified (R 25): "Well, the transportation by truck and by pipeline and the crude oil marketing business is really the business that I have known practically all my life, particularly the transportation aspects of it and I wanted to get back in business."

tile because of the obstacles built into the regulation and beyond the reasonable control of Basin."

Then the district court addressed itself to whether the permanent foreclosure of new competition and the threatened destruction of petitioner were *necessary*, as FEA argued, to protect crude oil supplies of independent refiners. It found the freeze to be quite *unnecessary*.

Subsequently the soundness of that determination was reinforced by the publication of a monumental study done for the President of the United States under the co-chairmanship of *Frank G. Zarb*, FEA Administrator, and *Paul W. MacAvoy* of the Council of Economic Advisors. On January 11, 1977, there was publicly released a 428 page report of the *Presidential Task Force on Reform of Federal Energy Administration Regulations* which recommends that the FEA **"eliminate the supplier/purchaser freeze on crude oil"** — both during normal supply periods and during shortage periods (pp. 20-21).

From the evidence the district court found these facts (App. 16):

> "To assure adequate supplies of crude oil to small independent refiners, the FEA presently has in effect a regulatory program (the 'buy-sell' program) which enables it to provide for an equitable allocation of crude oil among all domestic refineries.
>
> "Although it would entail some administrative burden, the FEA can make reasonable modifications in its buy-sell program to avoid any unwarranted deprivations upon small independent refiners which might be caused by the abolition of the freeze rule."

The record fully supported those findings. On appeal TECA in effect acknowledged that (App. 31-2):

> "It is true that the district court found that the buy-sell program could do just as effective a job of protecting the small independent refiners as the current freeze rule, and *we do not specifically overturn that finding.*"[7]

TECA's second opinion accurately describes the *standards* of judicial review applied by the district court and the relief granted (App. 23):

> "Because of these factors, the supplier-purchaser freeze rule was found to be **arbitrary, capricious,** and an **abuse of discretion,** and its enforcement against Basin was enjoined."

Those are the standards of judicial review and the specific remedy expressly prescribed by statute (*supra* p. 3).

In reversing, TECA regards those standards prescribed by *statute* as too lax and substitutes instead a different standard of its own making (App. 23):

> "Of critical importance to this case is what

[7]TECA inferred substantial legal significance from the mere identity of the intervenor, saying, "That the trade association [IRAA] of these refiners attempted to intervene in this case to save the regulations supports such a conclusion." This is a bootstrap argument because FEA and the Justice Department had themselves solicited the intervention. On July 16, 1976, the trade association secretary sent out a bulletin to his membership stating "IRAA has been asked by the Federal Energy Administration and the Department of Justice to help in defending . . ." Ex. No. 61.

standard the trial court should have applied in evaluating the FEA's regulation. This Court concludes that the regulation should have been upheld if it had any **rational basis** to support it."

Therein, we submit, lies an error of such far-reaching import as virtually — perhaps literally — to nullify the right of a citizen aggrieved by federal *adminstrative* action to the protection of the meaningful *judicial* review which Congress wrote into the scheme of things.

REASONS FOR GRANTING THE WRIT

There are three.

I

The court below has erroneously decided an important and recurring question of federal law that should be authoritatively settled. It has a potentially controlling effect on every judicial review of any administrative action by the FEA — and perhaps even by other federal administrative agencies as well.

If the second TECA opinion stands, the citizen's right to judicial review of the actions of this very active and far-reaching agency is meaningless and no longer worth the effort. The loss of a right so fundamental to our system of government would be truly tragic:

> "The guarantee of legality by an organ *independent* of the executive is one of the profoundest, most pervasive premises of our system . . . . it is clear that the country looks, and looks with good reason, not to the agency, but to the courts for its ultimate protection against executive abuse."[8]

Only last April TECA assured petitioner that it would be afforded a *meaningful* judicial review of administrative action which was devastating to petitioner and appeared to be fundamentally unreasonable. TECA's original opinion in this case specified the controlling fact issues and directed the district court to make a "critical scrutiny" of the offensive regulation in "an expedited hearing". That direction was scrupulously followed. Comprehensive findings and conclusions were made. The district court heard two full weeks of evidence and, on the basis of detailed findings from that evidence, concluded that the freeze out regulation

> "is **arbitrary, capricious,** and an **abuse of discretion** in that it effectively eliminates recent comers from the crude oil marketing industry without any compelling circumstances to do so and in that it does not, as to such new market entrants, constitute an allocation of crude oil but is rather a total denial of access to crude oil to them and is unlawfully discriminatory as to the Plaintiff and any other new market entrant." (App. 18).

TECA's second opinion does not question the record support for that conclusion. Rather, contrary to its earlier opinion in this case, *the Court now says that that is not enough!!* We are now told that the district court could enjoin the enforcement of the regulation against petitioner only if it first concluded that the

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[8]Jaffe, *Judicial Control of Administrative Action* (Little Brown and Company 1965), p. 324.

agency was totally *irrational.* Surely there can be administrative error short of insanity. And administrative action that is arbitrary, capricious, and an abuse of discretion *is "irrational"* — in every sense of the word except "insane".

If it really is the law that this administrative agency — or any other — can act arbitrarily, capriciously, and with an abuse of discretion and still have its actions immune from judicial correction so long as there is any rational argument for them, then for all practical purposes the administrative agency has become the ultimate judge of its own conduct.

II

The decision below is in conflict with two different acts of Congress. The Administrative Procedure Act says in plain English that the "reviewing court *shall* hold unlawful and set aside agency action found to be **arbitrary, capricious,** an **abuse of discretion,** or otherwise not in accordance with law". (*supra* p. 3). The Economic Stabilization Act of 1970 likewise prescribes as the proper standard of judicial review of administrative actions the question of whether they are **arbitrary** or **capricious.** (supra p. 3). The opinion below, in holding findings of arbitrariness and capriciousness to be an inadequate basis for judicial action —and insisting upon a determination of "irrationality"—apparently *in haec verba*—takes away from the aggrieved citizen that measure of protection which Congress has afforded him.

The fact that such an error was committed by

TECA should be of unique concern because, unlike other courts of appeal, there is no sister court with jurisdiction to exericse its own judgment on this important question. There can be no conflict between circuits when only one court of appeals has exclusive jurisdiction. Section 211(b) of the Economic Stabilization Act of 1970, 12 USC 1904, note, creates TECA and provides that in general that court

> "shall have *exclusive* jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder."

That condition in itself merits special alertness in the exercise of the supervisory jurisdiction of this Court, because, in the absence of review by this Court, a TECA error is peculiarly self-perpetuating.

In fairness to the judges who serve on TECA it should be said that the problem is aggravated by the fact that their responsibilities on that court are in addition to the heavy workloads under which they already labored. The Chief Justice of the United States in his 1977 Report to the American Bar Association, 63 A.B.A. Journal 504, 506 (April, 1977), made this point:

> "Again in 1973, the Congress created the Emergency Court of Appeals and, again, no provision was made for judges except that the Chief Justice was directed to designate members of that court from judges then in service. Here, a very important judicial function was added with no provision made for its performance."

Though TECA, being vested with exclusive intermediate appellate responsibilities, cannot be in conflict on this question with other circuits, it does sit in panels of three and is now in conflict with itself.

With a change in panels TECA has done a complete about face in this very litigation. In fact the inconsistency of the conflicting decisions by two panels hearing the same case is so glaring that it has been *publicly* emphasized in the Commerce Clearing House reporter:

> "In its earlier decision to send the case back to the district court, TECA made a statement implying support for the marketer's position: 'Certainly, any governmental action which will effectively eliminate relatively recent comers from an industry calls for critical scrutiny and can be justified only by a clear showing of compelling circumstances.' **TECA, however, normally sits as a three-judge panel, and two out of the three judges involved in the first opinion were not on the bench when the reversal was handed down.**"[9]

The present Chief Judge of the Fifth Circuit has spoken eloquently to this very point:

> "[A] most important consideration is stability in the law — a sort of permanence and sureness in decision apart from the make-up or composition of the particular tribunal so far as the person of the Judges is concerned. That, of course, is a matter of growing concern to Courts such as this one in which as a multiple Judge tribunal, we sit by statute in panels of not more than three

[9]CCH Energy Management, report of March 15, 1977, p. 2. See also footnote 5 at p. 8 above.

> judges. 28 U.S.C.A. § 46(c). * * * We think that in a multi-Judge Court it is most essential that it acquire an institutional stability by which the immediate litigants of any given case, and equally important, the bar who must advise clients or litigants in situations yet to come, will know that in the absence of most compelling circumstances, the decision on identical questions, once made, will not be re-examined and re-decided merely because of a change in the composition of the Court or of the new panel hearing the case."[10]

This Court, which always sits *en banc*, is the proper tribunal to act in that situation. It is analogous to a conflict among circuits which is traditionally recognized as a very good reason for the grant of certiorari.

III

The decision below is a death sentence for petitioner. The district court specifically found from substantial evidence that, if the freeze rule is not corrected, "in all likelihood, Basin will be forced out of business". (App. 16).

The immediate devastation of that "sentence" is perhaps only upon a few owners and twenty or so employees. The broader impact is on the public interest that we Americans believe to be well served by new competition. And there are intangible repercussions upon other citizens who one day themselves may be deprived of the right to continue some small busi-

[10]Lincoln National Life Insurance Co. v. Roosth, 306 F.2d 110, 113-14 (5th Cir. 1962) as quoted in Lumbermen's Mutual Casualty Company v. Wright, 322 F.2d 758, 764 (5th Cir. 1963).

ness because arbitrary and capricious administrative actions are forcing it to close.

For the FEA to take away petitioner's right to do business is no less serious than confiscating its building, trucks, funds and other assets and turning its employees out into the streets for the right to do business is itself the sum total of petitioner's assets of value. Mr. Justice Brandeis put it so simply:

> "The right to carry on business — be it called liberty or property — has value. To interfere with this right without just cause is unlawful."[11]

In a word the action against which petitioner sought and obtained judicial protection from the reviewing district court is nothing less than a confiscation of its liberty and its property — all without compensation of any kind.

CONCLUSION

Candidly there is a growing resignation to the view that TECA is a special tribunal of otherwise busy judges established to *defend* FEA actions — regardless of the merit of the challenge — rather than genuinely to *review* them. Decisions such as the second TECA opinion below tend to perpetuate that unhealthy loss of confidence in the use of the judiciary as a protector against administrative excesses. In the nature of human affairs no administrative agency can be right all of the time. When any branch of government lapses into thinking otherwise, individual

[11] Dorchy v. Kansas, 272 U.S. 306, 311 (1926).

rights begin to lose their meaning and it is not an overstatement that nations begin to decay.

For the foregoing reasons, we believe the grant of this petition for a writ of certiorari to be in the highest traditions of the supervisory appellate jurisdiction of this Court.

Respectfully submitted,

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